

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRTIETH REGION

Madison, WI

**Trans American Systems, Inc.,  
d/b/a Madison Media Institute<sup>1</sup>**

**Employer**

**and**

**Case 30-RC-6452**

**Wisconsin Federation of Teachers,  
affiliated with the American  
Federation of Teachers, AFL-CIO<sup>2</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board (Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>3</sup>

The following employees of the Employer constitute an appropriate voting group for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time instructional staff, instructional support staff, director of training and program coordinators, studio manager and program

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner's name appears as amended at the hearing.

<sup>3</sup> The Employer and Petitioner filed post-hearing briefs that were duly considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

coordinator, program coordinators, and admissions representative employed by the Employer at its Madison, Wisconsin facility; excluding student tutors, office clericals, guards, managerial employees and supervisors as defined in the National Labor Relations Act.

There are approximately twenty-five employees in this appropriate voting group.<sup>4</sup>

## **ISSUES**

The issues presented at the hearing are:

- 1) Whether the director of training and program coordinators, and studio manager and program coordinator are supervisors and/or managerial employees within the meaning of the Act.
- 2) Whether the program coordinators are supervisors within the meaning of the Act.
- 3) Whether the admissions representative shares a sufficient community of interest to be included in the bargaining unit.

The Petitioner contends that the director of training and program coordinators, and the studio manager and program coordinator are not supervisors and/or managerial employees within the meaning of the Act, that the program coordinators are not supervisors, and that the admissions representative does not share a sufficient community of interest to be included in the bargaining unit. To the contrary, the Employer would exclude the director of training and program coordinators, and the studio manager and program coordinator as supervisors and/or managerial employees. The Employer also maintains the program coordinators are supervisors under the Act, and that the admissions representative shares a sufficient community of interest to be included in the bargaining unit.

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<sup>4</sup> The parties stipulated that the following substitute instructors are not included in the unit: Carmen Hamilton, Karen M. Kral-Schoeneman, Caitlin Oliver-Gans, Justin K. Roberts, James N. Stamatakos, Jack Sayre, and Stanley M. Serkosky.

## **DECISION SUMMARY**

Based on the record, I find that the director of training and program coordinators, and the studio manager and program coordinator are not supervisors and/or managerial employees under the Act, and that they are appropriately included in the bargaining unit. Additionally, I find that program coordinators are not supervisors under the Act, and that the admissions representative shares a sufficient community of interest to be included in the bargaining unit found appropriate.

## **BACKGROUND**

The Employer is an accredited for-profit, post-secondary institution that trains individuals for careers in electronic media. Graduates receive either an associate degree, for completion of four semesters of instruction (60 credits), or a diploma in radio broadcasting or video production (30 credits). The three primary areas of instruction are multimedia, broadcasting, and recording, each consisting of a separate department. Students in the multimedia department learn to use multimedia production tools to create everything from web pages to interactive presentations. Broadcasting students are prepared for careers in radio or television or video production. Recording and music technology students learn skills to work in recording studios or other related settings.

Courses are split between hands-on laboratory work and lectures, with approximately 60% of the time devoted to hands-on activities, and 40% to lectures. Instruction is provided on a trimester basis, each semester lasting about 15 weeks.

The Employer, or its parent, has been owned by the Hutchings family since 1986. Ed Hutchings is the president and his son, Chris Hutchings, who has been with the Employer for 16 years, is the school director. Jennifer Trendel is the director of operations; Jennifer Czubkowski

serves as the director of training and program coordinators. The Program coordinators are: Jamie Westpfahl, broadcasting; Michael Hammond, video; Betsy Matsushita, multimedia; Scott Alberts, recording. Besides being a program coordinator, Scott Alberts serves as the studio manager. Jeff Sears is the admissions representative.

## **ANALYSIS**

### **A. Supervisory Status**

The Employer contends that the director of training and program coordinators, the program coordinators, and the studio manager and program coordinator are supervisors.

The burden of proving that an individual is a statutory supervisor rests with the party asserting supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1863 (2001). The three-part test for determining supervisory status is whether: (1) the individuals have the authority to engage in any one of the twelve functions listed in Section 2(11) of the Act; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *Id.*

#### **1. Director of Training and Program Coordinators<sup>5</sup>**

Jennifer Czubkowski, who began her employment with the Employer as an instructor, became the director of training in April 2001. At that time, the job title was director of

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<sup>5</sup> Significant duties having been taken from her, Czubkowski disputes this is her current title. For purposes of this case, it is not necessary to resolve the dispute; it is only necessary that the parties understand what the duties of the position are for purposes of determining unit placement. Therefore, the Employer's job title -- director of training and program coordinators -- will be used in this decision.

curriculum, training and program coordinators. Chris Hutchings informed Czubkowski she would be replacing Jamie Westpfahl in the position because Czubkowski had a Master's degree in education and professional development, and that would satisfy the accrediting committee's requirement that the director of training hold a degree higher than that awarded by the institution.

After returning from a maternity leave on January 21, 2002<sup>6</sup>, Czubkowski was told by Chris Hutchings that some of her previous responsibilities had been shifted to Jennifer Trendel, the director of operations. For example, Czubkowski no longer approves instructor vacation requests, and no longer conducts regular biweekly meetings attended by program coordinators, but not instructors. At a subsequent meeting, Czubkowski learned that other duties were also stripped from her job. Hutchings, without advance consultation with Czubkowski, informed everyone that she was no longer in charge of curriculum,<sup>7</sup> and would no longer arrange for substitute instructors. At the same meeting, again without advance consultation with Czubkowski, Hutchings announced that Michael Hammond would become a program coordinator.

About April 10, Czubkowski received a memo in her mailbox from Hutchings, addressed to all instructors, stating that all the salaried staff was going to be converted to hourly pay. Czubkowski asked Hutchings, upon returning from vacation, if the memo was just for instructors or did it include her. Hutchings stated that the memo was intended for her, as she had some off-site hours, and that she was, therefore, classified as an instructor with some administrative duties.

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<sup>6</sup> All dates that follow are 2002, unless otherwise noted.

<sup>7</sup> Indeed, the Employer's brief concedes that at the end of January 2002, "...the primary responsibility for curriculum development was reassigned to the Program Coordinators. . ." and Czubkowski's "...position was changed to Director of Training and Program Coordinators." (citations omitted)

Last semester Czubkowski taught on Mondays, Wednesdays, and Fridays, and spent Tuesdays and Thursdays at home preparing for class (off-site hours). A later memo canceled the proposed switch to hourly pay. Upon becoming director of training and program coordinators, Czubkowski received a \$4,000 per year salary increase.

On April 26, Hutchings informed Czubkowski that her duties included assisting instructors with their professional development. To that end, Czubkowski is responsible for conducting instructor assessments, a peer review process involving the observation of instructors by other instructors and program coordinators, followed by discussions of how to improve classroom presentations. Professional development also includes in-service training, which typically involves extending an invitation to an outside speaker during semester break.

As an instructor in the multimedia department, Czubkowski is assigned to program coordinator Betsy Matsushita. Although a full-time instructor, Czubkowski works fewer hours than the other full-time instructors. Czubkowski does not have an office; she has a cubicle in a room shared by all the instructing staff.

#### **a. Disciplinary Authority**

The Employer's brief contends Czubkowski possesses the authority to discipline employees as well as the authority to effectively recommend discipline, citing two instances of written discipline.

The first involves the notes of a June 7, 2001 meeting between Scott Weaver, an instructor, and Czubkowski. According to the Employer, Czubkowski's notations that this was his second warning (and the next time he did not show up on a scheduled day she would "be forced to dock him one vacation day for each day he did not get authorization to be gone from

work”) and that he engaged in a conflict of interest which should be considered a “warning,” demonstrate her authority to issue discipline. Czubkowski testified that she held this meeting with Weaver at Hutchings' insistence, that she had no familiarity with Weaver's conduct, as they worked different schedules, and that Hutchings instructed her as to the topics to be covered.

The second instance concerns an October 16, 2001 letter signed by Czubkowski and Hutchings to instructor Robert Brady, stating, “This is your written warning in regards to job performance.” As the letter states, Brady had not submitted curriculum materials due between April 30 and July 31, 2001, even though he received a “verbal warning from Chris Hutchings in June of this year.” Brady was also warned that if he did not supply his curriculum material by October 19, 2001, “the next course of action may be termination.” Petitioner asserts Hutchings' signature appears as an acknowledgement that he “was merely made aware of the circumstances leading to the decision to discipline Mr. Brady.”

Next, Petitioner argues, based on excerpts from a January 20 letter from Czubkowski to Brady, that Czubkowski removed Brady from his position as a program coordinator. Czubkowski claims she acted at Hutchings' direction, and was responding to a November 12, 2001 letter by Brady (which is not in the record).

In context, the correspondence relied upon by the Employer to establish Czubkowski's authority to discipline, or effectively recommend discipline, does not establish supervisory authority. For example, the October 16, 2001 letter to Brady notes that Hutchings administered a verbal warning to Brady in June, 2001. Hutchings need not have signed the October 16, 2001 letter to become aware of the discipline issued to Brady, a “cc” to Hutchings would have been

sufficient to accomplish that objective. He signed the letter because he was responsible for the discipline.

I need not reach an ultimate conclusion concerning Czubkowski's disciplinary authority, however, based on the correspondence discussed above. Czubkowski testified, without contradiction, that upon her return from medical leave in January, all of her previous duties, save one, were gradually taken away from her. The Employer attempts to circumvent this testimony with argument:

Further, despite her contention that she was stripped of all her authority, with the exception of continuing to be responsible for Instructors' professional development, Ms. Czubkowski never got a pay decrease. (citations omitted)

Argument in a brief cannot substitute for evidence. Critically, the Employer never tendered any evidence to confute Czubkowski's testimony that she lost all of her previous authority soon after her return from medical leave. Hutchings was recalled as an Employer rebuttal witness, but he did not testify that Czubkowski retained her previous authority upon returning from medical leave. As the Employer's evidence of disciplinary authority pre-dated the loss of that authority (in the months following Czubkowski's return from medical leave) and there is no evidence that the director of training and program coordinators position currently has disciplinary authority, this Employer argument must fail.

#### **b. Hiring Authority**

According to the Employer's brief, the director of training and program coordinators' authority includes “. . .reviewing resumes, interviewing candidates and making hiring decisions



with respect to Instructor and substitute Instructor positions.” The most recent example of the exercise of this authority involved applicants for substitute instructor positions: “. . . Ms. Czubkowski was responsible for reviewing resumes submitted by applicants for substitute Instructor positions and selecting those individuals to be placed on the list of substitutes to be used to fill in teaching classes when necessary.” (citations omitted) As for Hutchings' role, the Employer argues he “. . . is merely concerned with putting the individuals selected for hire on the payroll and ensuring that accrediting commission standards have been met with respect to the individuals selected for hire by the Director of Training and Program Coordinators.” (citations omitted)

Contrary to the Employer's arguments, there is no evidence Czubkowski interviewed either substitute or regular instructor applicants, or made hiring decisions. While off on maternity leave, Czubkowski was asked to review resumes contained in a manila folder and to “make a few selections.” Czubkowski testified, without contradiction, that she separated the resumes into two groups: graduates of the Employer and non-graduates, and returned the folder to Hutchings with a note that read: “Please review the selections that were made. Get back to me whether or not I should contact them.” Czubkowski later met with Hutchings, who directed her to telephone selected individuals and offer them substitute positions at the rate specified. The Employer submitted no evidence that Czubkowski's selections were the ones offered substitute instructor positions, or that her groupings influenced the hiring process. Moreover, even if Czubkowski once had the authority ascribed to her by the Employer, there is no evidence she retained that authority after returning from maternity leave, or that her job now has that authority.

**c. Promotion Authority**

The Employer contends Czubkowski was responsible for promoting Jesse Stewart and Mike Madhouse from lab assistant to instructor positions. The evidence demonstrates that Stewart was already an instructor when Czubkowski assumed her duties in 2001. In fact, Hutchings testified more than once that no instructors were hired after Czubkowski assumed her duties in April 2001. It would have been a simple matter for the Employer to present records within its possession showing when Stewart and Madhouse were promoted to instructor positions, and who was responsible. No such evidence was offered. In any case, there is no evidence any promotional authority survived Czubkowski's return from maternity leave.

**d. Instructor Work Assignments**

Several memos written by Czubkowski in 2001 are cited in the Employer's brief as evidence she could assign work to instructors, both collectively and individually. A May 15 memo from Hutchings to the salaried teaching staff, however, reads:

If your workload is under 20 hours of instruction time you need to see me to determine what additional work assignments you could take on to maintain your full time status.

Hutchings, when questioned about the May 15 memo, confirmed Czubkowski's testimony that after she returned from maternity leave in January, she lost most of her previous duties; in this case, her authority to assign work to instructors:

The previous year Jenn Czubkowski had taken the responsibility of assigning that additional work to those instructors.

The documentary evidence establishes that since returning from maternity leave, Czubkowski has not signed any vacation and leave of absence authorization requests, a duty that

has been assumed by Jennifer Trendel, director of operations. The Employer's argument that Czubkowski has retained this authority is unconvincing.

**e. Instructor Evaluations**

The Employer contends the director of training and program coordinators is a supervisor because she “. . .checks and evaluates the work of Instructors and Program Coordinators,” based on a peer review system. As described in the Employer's brief:

Madison Media Institute has a peer evaluation system where Instructors' peers complete a questionnaire or evaluation form according to what they observe during another Instructor's class and also provide students in the class with evaluation forms concerning the particular Instructor. Instructors can be assigned to evaluate other Instructors as well as Program Coordinators, who also have instructional duties, and vice versa. As shown in Employer Exhibit 2, Director Hutchings is not part of this evaluation process. (citations omitted; underlining in original)

Though Hutchings is not part of the peer evaluation system, he does evaluate instructors, and his determinations are the basis for salary increases.

The evidence is undisputed that peer evaluations have no impact on raises, and exist only to assist instructors in improving their teaching skills. In a January 30 memo (an Employer exhibit), Czubkowski wrote to instructor Robert Brady: “You are also fully aware that the assessment (peer review) has no effect on advancement or raises.”

In *Williamette Industries, Inc.*, 336 NLRB No. 59, slip op. at 2 (October 1, 2001), the Board wrote:

The Board has found that the authority to “evaluate” is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *Elmhurst Extended Care Facilities*, 329 NLRB 525, 536 (1999). Accordingly, “when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.” In *Elmhurst*, as in this case, there is insufficient evidence that the evaluations have any direct effect on the evaluated employees' status or tenure.

The fact that Adams and Moore complete these evaluations, standing alone, is insufficient to support a finding of supervisory authority. (footnotes omitted)

Of particular relevance to this case is the following:

Although the evaluations make recommendations specifying the skills employees should develop to improve the quality of their work, there is no evidence that the Employer has taken any action in response to an employee's failure to follow an evaluation's recommendation. *Id.*

**f. Professional Development and In-Service Training**

According to the Employer, “The Director of Training and Program Coordinators also sets standards, criteria and schedules for Instructors and Program Coordinators with respect to their professional development.” To support this argument, the Employer points to a May 28 memo, described as “. . . a draft of such standards and schedules, prepared by Ms. Czubkowski in her role as Director of Training and Program Coordinators.” The memo is from “Chris Hutchings” to “Current Instructing Staff,” but the Employer's brief maintains,

The reference to being from Chris Hutchings rather than Ms. Czubkowski, who authored the memo and who is responsible for professional development in her role as Director of Training and Program Coordinators, is an error in the draft.

Two facts undercut the Employer's argument based on the May 28 memo. First, Czubkowski's handwritten note at the top of the memo proves that she prepared the memo, not on her own, but at the behest of Hutchings: “Per your request--make changes. . .” Second, Czubkowski's second page footnote unmistakably distinguishes her role from Hutchings':

Modules must be completed as outlined above for the next year. The **Training Director** can assist you in the completion of the modules. Please turn your completed modules in to the **Training Director**. If the modules are not completed as outlined above **I will issue a verbal warning** that will be documented and placed into your employee folder. If you continue to be behind schedule a 2nd warning will be issued in a written format and placed into your employee folder. If you are continually behind, **I will assume** you no longer wish to instruct and a replacement will be found. (bold added)

If the memo had been intended from Czubkowski, she would not have referred to herself in the third person, as the Training director, but would have used the first person, which she reserved for Hutchings, who was responsible for supervisory enforcement of the requirements.

An additional argument the Employer advances in its brief is that Czubkowski “. . .not only decides the topics to be taught and the individuals who will be contracted with to teach the topics, but also who must attend the in-services.” In her role as “Director of Training” (which is how Czubkowski signed the March 4 and May 6 memos to the staff, which the Employer relies on) she writes in the May 6 memo: “You are not required to attend if you have prior authorization from Jennifer Trendel or Chris Hutchings.” Any supervisory aspects of the in-house training reside with Trendel and Hutchins, not Czubkowski.

**g. Grievances**

In its brief, the Employer contends instructors submit grievances to Czubkowski, and she, in turn, “. . .deals with them according to employee and school policies.” Two of the “grievances” cited are from 2001, but there is no evidence Czubkowski had authority to adjust grievances (even if she ever had it) after her return from maternity leave in January. A third “grievance” involved an e-mail from program coordinator Matsushita who raised a concern brought to her by an instructor. Matsushita testified, without contradiction, that she never received any guidance, and there was no follow up to the e-mail. Under these circumstances, it cannot be established that Czubkowski has authority to accept and adjust grievances on behalf of the Employer.

**h. Attendance at supervisory meetings**

Although Czubkowski meets with Hutchings and Trendel, in some meetings with program coordinators and in others by herself, the evidence does not establish that the meetings are for purposes related to supervisory authority. For example, the Employer in its brief cites discussion of policies such as “vacation and time off.” Yet, the evidence demonstrates that after Czubkowski's return from maternity leave she no longer approves time off for instructors. Czubkowski's meetings are a consequence of her role as director of training, not her being a supervisor.

**i. Independent judgment and discretion**

The Employer argues in its brief that Czubkowski's 1991 pay increase of \$4,000 was in recognition of her supervisory duties. Additionally, because Czubkowski's teaching load is less than other full-time instructors, the Employer contends the extra salary must be for her supervisory duties. Whatever Czubkowski's duties in 2001 (and the Employer concedes she lost some duties in 2002), she undeniably remains responsible for staff training, a responsibility that consumes a portion of her non-classroom time. To say she is paid more money for being a supervisor, when there is no evidence of supervisory status, begs the question.

In-service responsibilities involving decisions “as to the content and agenda” of training, who should conduct that training, and how much should be spent (within guidelines established by Hutchings), are not attributes of supervisory status. They may exemplify discretion in performing her job, but they don't establish that Czubkowski is a supervisor.

According to the Employer's brief, “Another example of the use of discretion and judgment in performance of the job duties of the Director of Training and Program Coordinators is the preparation of the Madison Media Institute Instructor Training Manual.” Conceding

Hutchings has the final authority as to the content of the Manual, the Employer nevertheless asserts he gives “complete weight” to Czubkowski's input into the Manual. Whatever Czubkowski's role in preparing the Manual, there is no dispute she played no role in developing the Employee Handbook, a separate exhibit introduced by the Employer. It is the Handbook that “. . .is designed to acquaint (the staff) with MMI and provide you with information about working conditions, employee benefits, and some of the policies affecting your employment.” A comparison of the Manual and the Handbook leaves no doubt the manual relates exclusively to instructor training, not to supervisory authority.

In sum, the Employer has not met its burden of demonstrating that the director of training and program coordinators is a supervisor within the meaning of the Act.

## **2. Program Coordinators**

Although the Employer asserts program coordinators have a “. . .collective role to be the supervisors of the Instructors,” the Employer also contends the program coordinators have the authority to “interview and hire” student tutors. The tutoring program was created in the Fall of 2001 to provide assistance to students who were having difficulty in their classes. Those students interested in becoming a tutor must meet certain pre-established criteria and must submit a resume and cover letter to the program coordinators. Dave Jensen, an instructor, is responsible for scheduling tutors with students.

Contrary to the Employer's arguments, the evidence is far from certain that the program coordinators “interview and hire” student tutors. Program coordinator Betsy Matsushita testified she compared resumes submitted to the front office with the pre-established criteria and then passed along the resumes to Dave Jensen. There is no evidence of the precise role in the hiring

process of student tutors played by the program coordinators vis a vis David Jenson. The evidence, thus, does not establish that the program coordinators “interview and hire” student tutors. Moreover, the student tutors are excluded from the bargaining unit.<sup>8</sup> In *Detroit College of Business*, 296 NLRB 318, 320-321 (1989), the Board rejected the rule that “any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor.” Instead, the Board held it would decide on a case-by-case basis whether supervision over non-unit employees conferred supervisory status. Here, in contrast to the department coordinators in *Detroit College*, at 321, the program coordinators do not exercise supervision over the student tutors, and any role in hiring is ancillary to the primary duties of the program coordinators.

Since the program coordinator position was created in March, 2001, no regular instructors have been hired from the outside. According to the Employer's brief, the process of hiring an instructor would involve the following:

...initially resumes would be reviewed by the Director of Training and Program Coordinators, who **may** then seek the advice of, or involve, Program Coordinators **as she deems necessary** before making a hiring decision. (bold added)

The Employer's acknowledgement of possible involvement, in a minor way, does not establish a sufficient role in the hiring process to find the program coordinators are supervisors.

An example where program coordinator Jamie Westpfahl recommended the hire of Linda Goldfarb as a part-time instructor cannot establish that Westpfahl hired, or effectively recommended, Goldfarb for hire. Goldfarb had worked as a part-time instructor for the Employer previously, and when Hutchings spoke to Westpfahl about someone to teach a night class, Westpfahl suggested Goldfarb. Westpfahl volunteered to call Goldfarb, and in that call

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<sup>8</sup> The Employer, while not stipulating to the appropriateness of the unit because of the placement of the positions subject to this Decision and Direction of Election, agreed that the student tutors would be excluded from the bargaining unit.



informed Goldfarb to make interview arrangements directly with Hutchings. Westpfahl played no other role in Goldfarb's hiring.

The involvement in the promotions of lab assistants by program coordinators Betsy Matsushita and Scott Alberts, similarly, falls short of what is required to effectively recommend for hire.

The Employer argues that the “. . . Program Coordinators are vested with the authority to determine Instructor teaching schedules and to assign work to Instructors.” As discussed previously, in a May 15 memo, Hutchings assumed all responsibility for instructor work assignments. Teaching schedules are the province of Jennifer Trendel, the director of operations.

As an example of other indicia of supervisory status, the Employer's brief cites the February 12 e-mail from Matsushita to Czubkowski as providing direction to instructors. Because there was no follow up to the memo, the evidence is insufficient to show the program coordinators resolve problems that are called to their attention.

Hutchings wrote an e-mail to program coordinator Michael Hammond on May 23, after the Petition in this case was filed and served on the Employer. In the e-mail, Hutchings complained that Hammond failed to take any action following a video presented at the May 17 graduation. The Monday following graduation, in two meetings, Hutchings expressed to Hammond his displeasure with the video, and said disciplinary action would be taken. For the first time, Hammond testified, his role with regard to the instructors was described as supervisory, and his opinion on discipline was sought. Hammond declined to take disciplinary action, stating that he had no disciplinary authority as a program coordinator. Based on these

facts, there is insufficient evidence to conclude Hammond had authority to discipline, or to recommend discipline, for the instructors.

As the Employer notes in its brief, “Program Coordinator Betsy Matsushita admitted that, in her capacity of Program Coordinator, she recommended that disciplinary action be taken against Instructor Weaver on at least two occasions.” Matsushita testified she twice recommended unspecified discipline be taken against Weaver, but never received any word if he was disciplined for either incident. The Employer cites a June 7, 2001 memo as evidence that Weaver, indeed, was disciplined as a result of Matsushita's recommendation. Weaver received two warnings in the memo, but neither was for discipline recommended by Matsushita. The second instance, where Matsushita recommended unspecified discipline, involved Weaver's departure from a classroom, after the class was in session. There is no evidence he was disciplined for this dereliction of duty. Thus, the evidence fails to establish that Matsushita could discipline instructors, or effectively recommend, such action.

Attendance at meetings with the director of training and program coordinators and Hutchings no more establishes supervisory status than they did in Czubkowski's case. Convening a meeting and instructing the program coordinators on the “Do's and Don'ts for Supervisors” is consistent with the Employer's position in this case, but that, in itself, does not make the program coordinators supervisors.

In minutes from an April 5, 2001 meeting, Czubkowski wrote: “Program Coordinators are not at this time any instructors' supervisors.” There is no indication in the minutes or in the record that Hutchings was at this meeting in his office or that he was aware of these minutes. Multiple witnesses testified that Hutchings made a similar statement at a general staff meeting

and picnic. He denied making such a statement. The dispute need not be resolved. The statement in this case neither proves nor disproves the program coordinators are supervisors. However, it is consistent with the evidence that the program coordinators are not supervisors.

### **3. The Studio Manager and Program Coordinator**

Scott Alberts is both the studio manager and program coordinator for the recording area. Alberts began his employment as an instructor in 1995; he became studio manager in May 1999, for which he received a pay increase. In April 2001, he was made a program coordinator, but did not receive an increase in pay. As studio manager, Alberts is responsible for maintaining the recording equipment and scheduling outside use of the facility. In addition to managing the recording studio, Alberts teaches 20 hours a week.

The Employer's brief states:

In terms of supervisory duties, along with assigning work to Recording Instructors, he also assigns maintenance and repair work to a casual employee, Mike Baylor.

At one time Mike Baylor was an instructor for the Employer, but he no longer performs those duties and is not listed on the Employer's organizational chart. Baylor spends the majority of his time on the road as a live sound engineer. When in town, he may be available to perform maintenance in the studio, or work on constructing a base trap. Baylor's services have been utilized in this manner for a little more than a year.

Although Alberts contacts Baylor to perform maintenance and repair work, there is no evidence Alberts exercises any of the supervisory indicia over Baylor. It appears Baylor performs his services as an independent contractor. Under *Detroit College, supra*, Albert does not supervise Baylor.

The Employer cites no examples where Alberts assigns work to recording instructors. Again, the evidence demonstrates that Hutchings has, and exercises, the authority to assign work to the recording instructors. Accordingly, the Employer has not met its burden of proving that the studio manager and program coordinator position is supervisory.

## **B. Managerial Status**

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court held: Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Id.* at 682-683.

### **1. Director of Training and Program Coordinators**

The Employer, in its brief, contends the director of training and program coordinators is managerial in the same sense as the faculty in *Elmira College*, 390 NLRB 842 (1992):

...when the faculty engages in such activities as participation in meetings and committees, determining curriculum and course schedules, and teaching methods and grading policies. The record establishes participation on the part of the Director of Training and Program Coordinators in similar activities.

At the hearing, the Employer acknowledged that as of the beginning of this year Czubkowski is no longer responsible for curriculum matters<sup>9</sup>. Course schedules are determined by Jennifer Trendel, operations director. There is no evidence Czubkowski has any responsibility with regard to grading policies. Moreover, as director of training, Czubkowski

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<sup>9</sup> In fact, the Employer dropped “curriculum” from the former job title: Director of Training, Curriculum, and Program Coordinators.

operates within a limited range, circumscribed by Hutchings. For example, her changes to the existing Instructor Training Manual were few and minor, despite the Employer's assertion that she significantly revised the Manual. In any event, she did not exercise independent authority regarding the Manual's content, as she clearly needed Hutchings approval before she could put the changes in final form. Another example of the limitations on Czubkowski's discretion (and where she needed approval from Hutchings) is reflected in the May 28 memo on Professional Development, to the "Current Instructing Staff" from "Chris Hutchings," as discussed above. This memo concerned "Professional Development Standards for Existing Instructors" and will become an appendix to the Manual.

Additionally, the Employer contends Czubkowski exercises authority ". . .to interpret, communicate and enforce management policies and procedures." The two memos relied upon by the Employer in its brief to support this argument are dated June 4, 2001, and August 31, 2001. There is no evidence this authority continued after Czubkowski's return from maternity leave in January.

Based on the above, the Employer has failed to prove that the director of training and program coordinators is a managerial employee.

## **2. Studio Manager and Program Coordinator**

The Employer maintains that Alberts, in his role as studio manager, is a managerial employee. Alberts is responsible for maintenance and seeking and obtaining outside help in repairing non-functioning equipment, but his spending authority, is limited by Hutchings' parameters. Certain repairs have to be made in order to keep the studio in operation; Hutchings

would have to have them done even if he made the final decision. Instead, Hutchings permits Alberts to contract with outside repair persons, but not without limits on what monies Alberts can commit. If the repair costs are excessive, Hutchings must be consulted.

Alberts distributed to the instructors a set of rules for conduct when using the recording studio which he prepared, almost exclusively without consultation. After Hutchings received a copy of the rules in his mailbox, he demanded that Alberts show any future rules to him (Hutchings) before distributing them to the staff. Alberts testified, without contradiction, that he could not enforce the rules, even in the face of instructors' disregard, because Hutchings, despite requests for disciplinary authority, would not grant it. If a promulgated policy cannot be enforced, it is effectively no policy -- and it is not evidence of effectuating management policies, and does not make the employer's decisions operative.

Although Alberts, as argued by the Employer in its brief, decides which outside group will be permitted use of the studio, when it will have access, and who will make the payment, these are routine decisions, divorced from managerial authority.

Based on the above, the studio manager and program coordinator is not a managerial employee.

### **C. Community of Interest**

The Employer would include the admissions representative, Jeff Sears in the unit. The Petitioner would exclude the position, for lack of a community of interest: "Of all those considered for inclusion in the bargaining unit, the Admissions Representative is the only one that has no assigned class room duties."

The Act does not require that a unit for the purposes of collective bargaining be the only appropriate unit or the most appropriate unit--Section 9(b) only requires that the unit be appropriate so as to assure employees the fullest freedom in exercising their rights guaranteed by the Act. See *Overnite Transportation Co.*, 322 NLRB 723 (1996). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising these rights, the key inquiry is whether the employees share a sufficient community of interest. See *Alois Box Co.*, 326 NLRB 1177 (1998). In determining whether the employees in the unit sought share community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See *Ore-Ida Foods*, 313 NLRB 1016 (1994), *affd.* 66 F.3d 328 (7th Cir. 1995).

Sears initially applied for a position with the Employer as an instructor, but was hired as the admissions representative in February. He has extensive teaching experience, over twenty years of post-secondary teaching at two-year community colleges and universities. About 36 to 40 hours a week are spent performing duties as admissions representative. In that capacity he reports to Steve Hutchings, the admissions director. However, Sears also reports to Czubkowski for purposes of teaching. Sears was hired with the understanding that he would be available to substitute teach, and in the future, he would be considered for regular course teaching assignments. Last semester, around Easter, he was approached by Czubkowski to substitute in her business English Class, which he did.

Although a portion of Sears' time is spent away from the facility, he has an office in the common area near the program coordinators and instructors. He conducts campus tours for

prospective students, mainly during regular class hours, thereby coming in contact with the instructors. His benefits are the same as those included in the unit.

In applying the community of interest factors described above, I conclude that the admissions representative shares a sufficient community of interest to be included in the unit found appropriate in this case.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election day, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Wisconsin Federation of Teachers, affiliated with the American Federation of Teachers, AFL-CIO**. If a majority of employees in the



voting group vote for the Petitioner, they will be taken to have indicated their desire to constitute part of the existing engineering unit represented by Petitioner and I shall issue a certification of results to that effect.

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them.

*Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, **two**, copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized.

**In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before June 24, 2002.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, Franklin Court, 1099 14th Street, N.W. Washington, DC 20570. **The board in Washington must receive this request by July 1, 2002.**

Signed at Milwaukee, Wisconsin on the 17th day of June 2002.

/s/ Philip E. Bloedorn

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